

U.S. Corrections Corporation and International Union, United Plant Guard Workers of America, UPGWA. Case 9-CA-27744

February 11, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

At issue is whether the Respondent unlawfully discharged two employees. On September 2, 1992, Administrative Law Judge Joel A. Harmatz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief. The Respondent also filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions² and to adopt the the judge's recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The eighth sentence of fn. 12 of the judge's decision should read, "Ballard did not squarely refute Fuson's testimony, but did aver that at the time, he would not have known that this was so."

² Consistent with his dissent in *U.S. Corrections Corp.*, 304 NLRB 934 (1991), Member Devaney would not assert jurisdiction over the Respondent. On that basis, he concurs with his colleagues in their dismissal of the complaint.

Mark G. Mehas, Esq., for the General Counsel.
Joseph A. Worthington, Esq. (Smith & Smith), of Louisville, Kentucky, for the Respondent.
Scott A. Brooks, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Lebanon, Kentucky, on June 4 and 5, 1991, upon an original unfair labor practice charge filed on August 6, 1990, and a complaint issued on February 25, 1992, alleg-

ing that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Gabriel Spalding and Charles Caldwell. In its duly filed answer, the Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record,¹ including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Kentucky corporation, pursuant to contracts with various governmental agencies is engaged in the operation of private correctional facilities, including the Marion Adjustment Center in Marion County, Kentucky. During the 12-month period ending December 31, 1991, the Respondent, in the course of that operation, purchased and received at said facility goods valued in excess of \$50,000 shipped directly from points outside the State of Kentucky.

The complaint alleges and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.²

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the International Union, United Plant Guard Workers of America, UPGWA (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case arises from the discharge of two correctional officers, Gabriel "Goober" Spalding and Charles Caldwell. Both were terminated during incipient stages of an organization campaign among the previously unrepresented guards at the Respondent's correctional facility in Marion County, Kentucky. At times material, this facility housed minimum security inmates pursuant to contract with various govern-

¹ Errors in the transcript have been noted and corrected.

² In its duly filed answer, the Respondent contests the Board's jurisdiction under the standards articulated in *Res-Care, Inc.*, 280 NLRB 670 (1986). This assertion was previously rejected by the Board in its Decision and Direction of Election in an earlier representation case. See *U.S. Corrections Corp.*, 304 NLRB 934 (1991). The record in this proceeding does not furnish a foundation for any different result. "It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related representation proceeding." *M. N. Clark's Discount Department Store*, 175 NLRB 337, 338 (1969). Thus, precedent reflects an injunction against the instability and procedural morass that would ensue if an administrative law judge were permitted to review collaterally a prior Board determination. Here, the Respondent has not produced evidence showing either special or changed circumstances, nor has it litigated any additional facts qualifying as newly discovered, previously unavailable evidence. Accordingly, clearly at this level, the Board's decision in the representation case is binding. See *Salvation Army of Massachusetts*, 271 NLRB 195, 197 (1984).

mental sectors of the State of Kentucky under authority of legislation fostering the privatization of prisons.

Spalding and Caldwell were among five early employee organizers that attended an initial meeting on April 30, 1990,³ with George Squire, the president of the Union's Local 110. They at that time obtained blank union authorization cards. They claim to have solicited signatures from numerous coworkers, with Spalding testifying that he obtained 18 to 20 and Caldwell asserting that he secured three or four. The employment of both ended during the week ending May 11. An election petition was filed by the Union on Monday, May 14.

The General Counsel contends that Spalding and Caldwell were terminated in reprisal for union activity, while the Respondent defends on grounds that both were discharged for legitimate cause in consequence of their misconduct on May 8.

B. Events Leading to the Discharges

1. Gabriel "Goober" Spalding

On Tuesday, May 1, Jerry Ballard, the Respondent's unit manager, and Spalding's superior, informed Spalding that he needed a haircut.⁴ Spalding avers that he replied, "Well, I've been pretty busy on the farm and all. I'd get it cut when I could." According to Spalding, Ballard indicated, "within a week," whereupon, according to Spalding the discussion ended with his stating, "Yes sir, I'll try to get it cut within a week."

On Tuesday, May 8, Spalding reported for work. Although the previous Sunday and Monday were his days off, he reported without having complied with Ballard's direction. Ballard recognized this himself, and approached Spalding, stating, "Goob, you haven't got your hair cut." Spalding explained, "I've been pretty busy . . . I'm going to get it cut." Ballard then sent Spalding home, telling him to get a haircut, and then report to Jan Fuson, the director of the facility.

The second alleged discriminatee, Don Caldwell, rode to work with Spalding. As Spalding left his work area, he advised Caldwell that he would have to get a ride from someone else that evening. At Caldwell's request, Spalding then

informed Nicky Thompson that Caldwell needed a ride home.⁵

Spalding left the premises, but, then, decided that he wanted to see Director Fuson right then and there. As shall be seen, this resulted in an ugly confrontation with Fuson. The facts show that when Spalding reentered the grounds, Fuson was standing in the driveway with Associate Director David Donahue. Spalding was driving in excess of the posted speed limit of 10 mph. Fuson, without knowing who was driving, shouted "Slow the car down." Spalding then came to a halt.

What occurred next is subject to major conflict. According to Spalding, Fuson spoke first, asking, "What did you do, come back to whip my ass." Spalding avers that this remark made him angry. He testified that he then told Fuson, "Hold-up. I just want to talk." Fuson allegedly then said, "Get your ass off [the] grounds, until you get a haircut and then come and see me."⁶ Spalding claims to have then said, "Well, wait a minute, I'm here, I might as well talk to you now." Fuson then said, "If you want to talk, you go see Mr. Ed Wheatley, otherwise, get your ass off [the] grounds." Spalding then admittedly called Fuson a "mother fucker"⁷ declaring that he was "not a kid" and that Fuson "wasn't treating me like a dog." With this, Spalding left the premises.

Fuson testified that Spalding got out of his car in what Fuson described as a "very agitated state." Spalding fiddled with his shirt, allowing it out of his trousers, as he took a few steps toward Fuson, shouting that he hadn't time to get a haircut as he had been farming. Fuson claims that he did not respond to the outburst initially. However, after hearing the words "God-damn it" and "mother fucker," he told Spalding to leave the grounds and see him the next day. Fuson was forced to repeat this instruction several times over Spalding's continuing protestations, causing Fuson to join the shouting exchange. Finally, Spalding quit shouting, got back into his car and left the facility. Fuson was of the impression that the incident took place within earshot of nearby inmates, and later received reports that the yelling was heard well within the adjoining dormitory.

In characterizing the incident, Spalding blamed Fuson for his outburst. He downplayed his own negative state of mind, on returning to the facility, without first having gotten a haircut, first by denying, on inquiry from me, that he was prompted by anger:

Q. [Y]ou testified that when you came back, you weren't angry, but you were upset?

A. I was upset. I wasn't mad. I mean they told me to get a haircut, big deal.

And second by offering a temperate explanation for the return:

⁵ Thompson was also terminated, but the complaint does not challenge the legitimacy of his discharge.

⁶ Spalding seems to acknowledge that the conduct he imputed to Fuson was a bit out-of-character. For, he testified that this was the first time that Fuson had ever cursed him. He describes Fuson's alleged conduct as "a little irregular, because he's usually a pretty nice fellow or always has been towards me."

⁷ Spalding testified that he used this term because he was angry, that Fuson got "snotty," and he thought that Fuson was trying to provoke a "fight" with Spalding, who at only 5'8" weighs 300 lbs.

³ Unless otherwise indicated, all dates refer to 1990.

⁴ The timing of this directive is based on the credited testimony of Ballard. Spalding claims that it occurred later on May 4, a date which would have provided the Respondent broadened opportunity to detect his involvement in union activity, while lessening his culpability in failing to comply before May 8. In contrast, Ballard's written report places his intervention on Tuesday, May 1 (G.C. Exh. 6) and his testimony indicates that it occurred on that date at shift change when Spalding reported for work. It is certainly conceivable that the incident would have occurred on a Tuesday, since Spalding acknowledged that Sunday and Monday were his regular days off. More important, however, is the manner in which Spalding's testimony was elicited. Documentation in the hands of the General Counsel prior to the examination of Spalding indicated that the Respondent placed the directive on May 1. Yet, Spalding was not afforded the opportunity to contradict this evidence spontaneously and independently. Instead, it was the General Counsel that defined the May 4 date to Spalding through a prejudicially leading question. Aside from my basic doubts as Spalding's reliability, his affirmation of the date suggested by the attorney does not measure up to the proof offered by the Respondent, and is unworthy of credence.

Q. Now, after Mr. Ballard told you to get your hair cut and see Mr. Fuson, did you get in your car and drive off the premises.

A. Yes, sir, I went out the gate.

Q. And did somebody tell you to come back?

A. No, sir. I thought, "Well, I'll talk to Jan [Fuson]." Jan's a reasonable guy, I'll just stop and talk to him."

. . . .

I thought . . . he'll tell me, just go get a haircut and come back and that would be it.

He explained, however, that this all changed when he "stopped to see Mr. Fuson and he [Fuson] got cocky."

I credit Fuson over Spalding. The latter's testimony that Fuson was trying to provoke a fight struck as absolute nonsense. The remarks he attributes to Fuson hardly suggest an intention on Fuson's part to take on this man of enormous girth and obvious strength. Besides, Fuson had no reason to initiate belligerent behavior toward Spalding, who had simply been told to get a haircut and return, and whose reaction to that instruction is best described as an emotional, uncontrolled, attempt at rebellion. While it would have been a simple matter to comply with Ballard's order and get a haircut, Spalding elected to return to the facility. If not driven by anger, the question arises as to just what Spalding hoped to accomplish. Since May 1, he had not complied with Ballard's directive. What was there to discuss? I am convinced that Fuson's involvement in "yelling" was in reaction to the provocative actions of Spalding, including his driving on the parking lot at excessive speed and his unprovoked aggressive behavior.

The evidence substantiates that Spalding returned to the facility before getting a haircut, thus violating Ballard's direct order, and also, "engaged in conduct unbecoming, by using language, such as mother fucker in a loud, boisterous and disrespectful manner." (G.C. Exh. 7.)

In any event, the disciplinary reports constituting the assigned cause for Spalding's termination are in evidence as General Counsel's Exhibit 6 and 7. The first was issued by Ballard, and indicates that he sent Spalding home on May 8 after the latter failed to comply with his May 1 directive that he get a haircut. The second was signed by Fuson and outlined Spalding's offenses of May 8, including his disobeying an order that he leave the premises until getting a haircut and his abusive conduct toward Fuson. The document recommended dismissal.⁸ I find that these documents accurately portray the conduct by Spalding that actually took place.

Spalding asserts that, after leaving the prison, he arrived at his home about 4:30 p.m. Shortly thereafter, Caldwell and Nicky Thompson, who were assigned to Spalding's shift, arrived at his house. Caldwell reported that he too had been

sent home following a "heated argument" with Ed Wheatley, the deputy director of the facility. Thompson apparently walked off the job to give Caldwell a ride home. Spalding claims that he then called Unit Manager Bickett, inquiring as to whether they had been fired.⁹ Bickett allegedly replied that Caldwell and Thompson had been fired, but that Spalding could return after obtaining a haircut and talking with Fuson.

According to Spalding, all three then went to Sergeant Norman Brady's house. Brady advised that a memo had been distributed indicating that Caldwell and Thompson were barred from the grounds, and that Spalding would have access to the grounds only during regular working hours understood to be between 8 a.m. and 4 p.m.¹⁰

Sometime that evening, Sergeant Barry Brady testified that, while on duty, he received a telephone call in which he spoke to Thompson and Ballard. His handwritten summation of the call states as follows:

On 5-8-90 at approx., 1630 hrs c/o Lanham Radioed me . . . and stated that I no longer had a unit D officer, that c/o Thompson just walked out the front door, and stated that he was leaving.

At Approx. 1715 hrs c/o Thompson called and said he just left work to take c/o Caldwell home. C/o Thompson said to use his vacation time or comp time for his absences. I informed c/o Thompson I could not authorize that to be done.

I also spoke to c/o Spalding, he said that they would be in Friday to pick up their checks and didn't want to be fucked with.¹¹

Spalding testified that he could have called Brady that afternoon, but could not be sure. He denied being present when Thompson made such a call, and further denied any conversation with Brady concerning his check. Thompson denied calling or even talking to Brady concerning this matter. I believed Brady, and reject the implication that his reports were manufactured.

Fuson, having received a report as to the content of this phone call, instructed either Wheatley or Ballard to contact all three to make sure that they bring their uniforms and badges in on Friday or else their paychecks would not be released.

Spalding testified that Ballard called him at home about 3:50 p.m. on Wednesday, May 9. He claims that he was informed that he had been terminated, and was to bring in his uniforms and keys when he reported to pick up his check on Friday.¹²

⁹ On cross-examination, Thompson volunteered that it was he that called Bickett.

¹⁰ The document is in evidence as G.C. Exh. 14. With respect to Spalding, it states:

Gabriel Spalding may not enter the grounds except during the regular business hours but only with the intentions [sic] of seeing the Directors [sic] or the Deputy Directors.

¹¹ G.C. Exh. 4(a). Brady reaffirmed the statements attributed to Thompson and Spalding in his testimony. He also avers that he typed up this report the next day. Minor revisions were made that do not alter the substance. (G.C. Exh. 4(b).)

¹² Spalding's testimony is consistent with a representation contained in a position paper submitted by the Respondent's legal counsel.

Continued

⁸ The General Counsel engaged Fuson in argumentative cross-examination in which Fuson is taken to task for the language he used in his disciplinary report. Although that document does not reflect that Spalding disobeyed Fuson's order that he leave, the facts reflect that he resisted these directives, but ultimately did leave. I have no doubt that this conduct weighed into the decision and is within the disciplinary report's charge that Spalding conducted himself in "a disrespectful manner." I see no major substantive inconsistency between Spalding's misconduct, that which was described in the report, or the testimony of Fuson as to what he relied on.

This, however, might well have been a tactical error on Ballard's part. Thus, Spalding concedes that on May 9, he had not left home by 3:50 p.m. He admits that at that time he normally would be on the premises preparing for work. He knew he could not return until he got the haircut, and, as of that time on May 9, this hurdle had not been cleared. He does not deny that he had no intention of reporting for work on May 9, and his excuse includes a tacit admission that this was the case. Thus, he explains that he had not left for work because Norman Brady told him of the memo that Spalding was not to be allowed to enter the grounds after 4 p.m. However, Spalding could not have understood that this memo was designed to interfere with his working that evening. He admits that Bickett told him the night before that Caldwell and Thompson were discharged, but that he could return after getting a haircut and reporting to Fuson. In disclosing what Spalding told him about this conversation, Caldwell testified:

After Spalding got off the phone, he told me that Charles Bickett had told him that me and Nicky Thompson had been fired.

And that he was allowed to go back on grounds, between the business hours of eight to four. . . . if he got a haircut, to speak to Mr. Fuson.

Simply put, the memo offered no excuse for Spalding's failure to comply with Ballard's direction and his refusal to report to work on the evening of May 9.

Thus, the General Counsel's case is also beclouded by evidence that, prior to being informed of his discharge on May 9, Spalding might well have quit his employment. His refusal to get a haircut and report for his shift that afternoon were not merely a smarting gesture. The evening before, in his conversation with Sergeant Brady, he aligned himself with Thompson and Caldwell, who he knew had been discharged, advising Brady that all three would appear on Friday, May 11 to collect their checks. It is certainly arguable that in doing so, Spalding had communicated that he, like the others, did not intend to return to work, and, hence, that the May 11 paycheck would be his last.

2. Charles Caldwell

Caldwell's termination also is traceable to May 8. Like Spalding, he worked the second shift. At the time of his dis-

sel, dated September 27, 1991. That document unequivocally states: "Mr. Ballard informed Spalding of his discharge by phone on May 9, 1990." While I have my doubts that these unsworn statements, made prior to the issuance of a complaint, are a fundamentally sound source of truth on matters of detail, in this instance its accuracy is confirmed. Fuson, while obviously without knowledge of what Ballard actually told Spalding, or the others, insists that he did not instruct Ballard to inform them that they had been terminated. However, he admits that he did not instruct Ballard to refrain from telling them that they had been discharged. Ballard did not squarely refute Ballard's testimony, but did aver that at the time, he would not have known that this was so. He admitted, however that, at the time, he knew that the men were not returning to work. In any event, his recollection of the exchange was so feint that he admitted to the possibility that he might have testified, only 2 months after the discharges, at an unemployment compensation hearing, that he did in fact inform Spalding on May 9 of his discharge. I find that this was the case.

charge, he had no transportation, and was living in Spalding's home because dependent on Spalding for a ride to work. On that date, at about 4:10 p.m., Spalding informed him that he had been "asked to leave" and was going home. Caldwell requested that Spalding inform Nicky Thompson that he would need a ride.

A few minutes later, Caldwell, who was working in the Bluegrass unit, was sent him to the St. Mary's unit to pick up supplies. He took the van, arriving at the St. Mary's unit at 4:15, where he was approached by Randy Johnson. The latter was the deputy director of programs. He reported directly to Fuson. He had no authority over corrections officers. According to Caldwell, Johnson "jokingly" told him to "Find a job." Caldwell, also jokingly, responded that he was looking for a job and he "meant" it. Caldwell then continued on his way back to the Bluegrass unit. According to Caldwell, there was nothing more to the conversation.

Caldwell's testimony reveals that after his return to the Bluegrass unit, he was summoned to the office of Charles Wheatley, the deputy director of security. Randy Johnson was in Wheatley's office. Wheatley asked Caldwell what his problem was. Caldwell asked what he meant. Wheatley stated that Johnson reported that he had "broke an attitude" with Johnson when the latter told Caldwell to have a nice day. Caldwell denied this was the case, reiterating his version of the exchange with Johnson concerning his seeking another job. After Wheatley asked why Caldwell was still working there, both grew loud, with Caldwell explaining that he had bills to pay. According to Caldwell, Wheatley then asked what Caldwell expected of him, whereupon Caldwell replied, "from you, I don't expect nothing." Wheatley allegedly then told Caldwell to "get the fuck out of there."¹³

Caldwell then drove back to the St. Mary's unit where he ran into Nicky Thompson, stating that he needed a ride home because Wheatley had told him to leave. Thompson said he probably would be next, so he elected to leave his post to take Caldwell home. They then went to the security office where Steve Vota, a guard apparently was on duty. Instead of delivering his radio, holster, and the van keys to Vota, Caldwell dropped them on the floor, telling Vota that they told him to leave and he was leaving.¹⁴

After leaving the facility, they went to Spalding's house where at about 6 p.m., in consequence of the latter's phone call to Unit Manager Bickett, Caldwell claims that Spalding

¹³ Thompson testified that shortly after this session, Caldwell informed him that "he was told to leave and not to come back until his attitude changed." He did not testify that Caldwell mentioned Wheatley's use of abusive or profane language.

¹⁴ At the time, Caldwell admittedly was angry. The General Counsel sought to mitigate this aspect of Caldwell's conduct by eliciting testimony that he dropped them only a short distance—"at arms lengths . . . from about my knee." Initially, Caldwell testified that he did not hand the radio, holster, and keys to Vota because he was seated at the desk writing. Ultimately, on cross-examination, Caldwell admitted that he did not offer them to Vota because he was "upset." The General Counsel also elicited testimony that other officers had "tossed or dropped" their radios. There was no evidence that this had ever occurred deliberately out of pique. Thompson had accompanied Caldwell to the security office. He testified initially that they "didn't want to make no fuss, and just laid them [their radios] down and left." Later, Thompson admitted that the radios were dropped, but only "maybe a foot."

reported that he had been discharged.¹⁵ On Friday, May 11, when given his check, Caldwell also received "a final disciplinary notice."

Wheatley testified that on May 8, after Spalding had been sent home, Johnson reported that he had asked Caldwell how he was doing. According to Wheatley's information, Caldwell allegedly displayed a "very upset attitude" advising Johnson that he was looking for another job. Wheatley, only a week earlier, had occasion to meet with Caldwell to counsel him verbally concerning his attitude. On May 8, prompted by Johnson's report, he again met with Caldwell and as he commented to the latter on his attitude, Caldwell became upset, growing louder and louder to the point of belligerence, stating that he was working for the Respondent only because he needed a paycheck and that he was looking for something else. Wheatley claims that it became impossible to reason with him. With the interview making no progress, Wheatley became convinced that Caldwell could not conduct his duties as correction officer in his frame of mind, so Wheatley told Caldwell: "Go home, calm down, think about your priorities and come back tomorrow." After Caldwell left, Wheatley asserts that he received a report that Caldwell had walked into the security office, throwing his keys and radio onto the floor before leaving with Thompson. Wheatley, who denied authority to discharge on his own, that same evening prepared a disciplinary report in consequence, which recommended dismissal, and stated as follows:

Conduct unbecoming of an officer

On 5-8-90 at approximately 4:15pm deputy Director Johnson reported to me that he had talked to you prior to the above time. Mr. Johnson stated that he asked you how you were doing and you stated that you were looking for a job and you also stated that you meant it. You and I had a conversation just a week prior to this incident regarding your attitude and your belligerent insubordination. You were asked to come to my office again at approximately [sic] 4:35pm on the 8th of May to again discuss your attitude. You at this time explained to me that you were trying to find another job, and that you were only working here because you needed to pay some bills. You again, began to get upset and I instructed you to go home and think about your priorities and to return the next day to talk again. At this time you stormed out of my office and proceeded to St. Mary [sic] security office and threw your radio and van keys on the floor and left the grounds with C.O. Thompson.

Due to your belligerent attitude and your conduct unbecoming of an officer, I am recommending that your employment be terminated immediately. [G.C. Exh. 10]

Caldwell denied that he was ever insubordinate to a superior, that he held a belligerent attitude, or that he ever refused a direct order. Although disciplined in the past, Caldwell testified that he had never been informed that a

¹⁵This report was inconsistent with the fact that he had merely been suspended by Wheatley. Yet, Caldwell made no attempt after May 8 to clarify his employment status with any responsible official of the Respondent. Is it possible that Caldwell anticipated that his conduct after leaving Wheatley's office might have altered his situation?

failure to take corrective action might lead to discharge. While I have no reason to doubt that Caldwell's employment had not previously been threatened, there is little in his story that was believable.

While Johnson was not called as a witness, Caldwell's version of their exchange made no sense. I cannot imagine that this high-ranking manager, whose responsibilities included counseling services, but not security areas, would joke about a correction officer's employment security on that or any other occasion. Also difficult to believe is the testimony that Caldwell, having actively engaged in proselytizing for the Union, and having just learned of his coorganizer, friend, and car sharer's suspension, would have had the equanimity to treat such a remark as a joke. It is far more likely that, Caldwell, who had previously expressed unhappiness with his job, a condition no doubt exacerbated by what he had just learned about Spalding,¹⁶ snapped at Johnson, after the latter simply sought to initiate an exchange of pleasantries. This interpretation is consistent with the fact that Johnson carried the matter to Wheatley, and then joined the latter in confronting Caldwell in a disciplinary interview. It is unlikely that any of this would have been triggered by a jocular exchange.

Caldwell's testimony was flawed on other grounds as well. He denied Wheatley's assertion that they had discussed his attitude a few weeks earlier, yet his prehearing affidavit states that this was the case.¹⁷ His account of the May 8 conference with Johnson and Wheatley on direct examination was abbreviated and reflected sensitivity in a highly material area. Thus, he initially described Wheatley as terminating the session by telling Caldwell to "get the fuck out of there." There was no mention that he had been told by Wheatley that he had to get his "attitude straight," and that Wheatley told him to come back tomorrow if his attitude had changed. It was not until cross-examination that Caldwell admitted both. Finally, I did not believe the attempt to mitigate the manner in which Caldwell and Thompson deposited their equipment in the security office. Caldwell admittedly dropped the items out of anger, and, thus, the circumstances reflect that this was a gesture of pique, unlikely to produce the delicate bending of knee or body to assure that the drop is softened at no more than "a foot" or from "knee level."¹⁸

As in the case of Spalding, it is concluded that the conduct imputed by the Respondent to Caldwell is accurately de-

¹⁶There is no indication that, prior to this incident, Caldwell had received word that Thompson could give him a ride home.

¹⁷Caldwell could not explain how this reference could have appeared in the affidavit if it did not occur. In any event, he would latter admit that on the occasion in question he explained to Wheatley that he felt "burnt out" and needed a change, acknowledging that he probably had "slacked off" on his job, while indicating that he would accept a transfer to the Bluegrass unit.

¹⁸The extent of Caldwell's hostility is evident from the fact that it had not relented by the next day. Thus, though he admitted that Wheatley told him to come back the next day if his attitude had changed, he declined because as he put it:

I didn't want to go back mad. And he had me mad. And I didn't want to go back mad. I was upset with Mr. Wheatley, so I didn't go back . . . that next day.

scribed in Wheatley's written recommendation that he be discharged.¹⁹

3. The May 11 issuance of final paychecks

The veracity of Spalding, Caldwell, and Thompson is also brought into question by remarks they attribute to Deputy Director Johnson at the front gate on Friday, May 11. As promised all three went to the facility that day. They requested delivery of their checks at the front gate where their uniforms would be provided in exchange. This request was denied, and they were required to drive to the office area under escort from Sergeant Brady. There was indication that Donahue wanted to see the men in his office individually, but Spalding protested:

We're irritated because we were fired for no reason. We just want to have it done. Give us our checks.

According to Spalding, after some further discussion and a threat to seek legal counsel, Charlie Bickett complied giving each his check in an envelope containing their "write-up."

However, they assert that the true reason for their terminations was bared to them before they left by Deputy Director Randy Johnson. Spalding described the scene as follows:

[Randy] Johnson stuck his head in the window and said, "Well" . . . "It's been nice working with you guys."

And Charley [Caldwell] said, "Randy" . . . What about these write-ups? He said, You know it's a bunch of lies."

And Randy said, "Well, I know it's just a bunch of bullshit . . . You were fired because you stood up for something you believed in."

According to Caldwell, Randy Johnson approached the car and stuck his head in the window, wishing the three discharges good luck. Caldwell, in reference to his disciplinary notice, stated "You know these are a bunch of lies." Johnson, whose complaint to Wheatley lay at the cornerstone of Caldwell's discharge, allegedly replied "I know they are, but the only reason you all is fired, is because you all stood up for what you believed in."

Johnson was not called as a witness, and the record bears no indication of whether or not he was available to testify. The testimony offered by the General Counsel's witnesses therefore is uncontradicted. Nevertheless, my disbelief that any thing like this occurred is so compelling as to defeat

mechanistic acceptance of such testimony. Spalding, Caldwell, and Thompson were taken by me as untrustworthy witnesses. As heretofore found, the assigned reasons for their terminations actually occurred. Moreover, it makes no sense to me that Johnson, a ranking official at the prison, would compromise his status and align himself officiously with discharges through admission that anyone was discharged on false grounds.

Moreover, if Spalding, Caldwell, and Thompson are to be believed, Johnson, thereby, had acknowledged his own role as principal offender in a pretextual scheme. Thus, as Caldwell testified it was Wheatley's writeup of Caldwell that Johnson was describing as false.²⁰ Yet, Johnson himself would have been the major contributor to any falsehoods. Wheatley's report acknowledged that it was Johnson's allegations that led to the suspension of Caldwell on May 8:

Johnson reported to me that he had talked to you prior to the above time. Mr. Johnson stated that he asked you how you were doing and you stated that you were looking for a job and you also stated that you meant it.

Caldwell described his encounter with Johnson as "jocular." Thus, if Caldwell's overall testimony is believed, Johnson had absolutely no reason to report their exchange to Wheatley—that is, unless Johnson himself was out to set up Caldwell, and in that process concocted a major untruth. Accordingly, the premise of the General Counsel's testimony in this respect is that Johnson had triggered a pernicious scheme, but that once the objective had been achieved, he chose, for no apparent reason, to undermine himself by admitting that the Respondent's action, initiated by himself, was "a bunch of lies." In sum, this is one of those rare instances where mutually corroborative, uncontradicted testimony is so inherently untrue as to impel rejection.

C. The Prima Facie Case

1. Knowledge

a. Direct evidence

The brief interval between the discharges and union activity, at a minimum, provides a suspicion of illegality. This, however must be reinforced by evidence that at the time of the terminations the Respondent was mindful that the alleged discriminatees had engaged in union activity, or proof that the Respondent harbored animus against the union supporters.

During the timeframe prior to the discharges, the evidence of knowledge is limited to the lowest echelon of supervisory authority. Spalding testified to an incident that occurred on May 3, at shift change. Shortly before midnight, he allegedly left his post and was walking across the parking lot at the facility after receiving signed cards from two coworkers. Junior Adams, a sergeant and an admitted supervisor yelled,

¹⁹ Fuson claims that Wheatley's May 8 recommendation was not effective until May 11. He explains that it was on that date that the men signified their unwillingness to participate in an internal grievance process in which they could appeal the grounds for termination. This was based upon his assumption that no discharge is final until this system is exhausted. For all intents and purposes the discharges took place earlier. This was relayed on May 8 by Bickett, as to Thompson and Caldwell, and the next day by Ballard, in Spalding's case. Moreover, the grounds for termination were based in their entirety upon events occurring on May 8. Nevertheless, Fuson's description of this technical procedure by which a discharge becomes irrevocable impressed as a mental exercise consistent with his confusion as to the relative import of distinction between that which is final and that which is conditional.

²⁰ I understood Spalding's testimony as agreeing that Johnson merely stated that the grounds on which Caldwell was terminated were "lies." Thompson broadened the scope of Johnson's remarks to include himself and Spalding. Thus, according to his testimony, Johnson said that: "the reason we were fired was because we were standing up for . . . what was right. . . . [a]nd everything they were saying about us, wasn't true."

“Hey Goob . . . You’d better sort of watch that. You can get in trouble.” Spalding asked what he meant, whereupon Adams replied, “You don’t have to worry about me. If I was still a Guard . . . I’d help you be getting those cards signed.” On cross-examination, however, question was raised as to whether Adams was aware of just what Spalding was doing on the parking lot. At that point, Spalding testified that Adams never acknowledged that this was the case, but Spalding states that he “assumed” that Adams “was talking about the union.”²¹ Spalding admits that at the time of the incident, his shift had not ended, but that he just stepped out “to get a breath of fresh air.” The incident involved an incursion on working time and no union animus can be read into any warning to Spalding by Sergeant Adams. Moreover, there is no evidence that this low level supervisor “shared” any knowledge of Spalding’s union activity that he held with others within management. *Alexian Bros. Medical Center*, 307 NLRB 389 (1992). Indeed, any inference that he did suffers from the fact that Spalding had left his post, without relief, during working time to solicit cards. In these circumstances, it is reasonable to assume that management would have been made more of the incident had it been called to their attention.²²

Nicky Thompson testified to an incident suggesting that management was aware, generally, of union activity as early as May 4. Thus, he related that while passing the security office, he overheard a guard, Harold Smothers, informing sergeants Barry Brady and Mitchell Lee “about the Guards was trying to get a union.”²³ Barry Brady denied that Smothers on either May 4 or 7 mentioned the Union to him.²⁴ Thompson was not regarded as a reliable witness, and as between his uncorroborated testimony and Brady, the latter is preferred.

b. Inference

Two concepts are advanced to overcome the absence of direct evidence that the Respondent, at the time of discharge, was aware of the union proclivities of Spalding and Caldwell. Both are consistent with the principle that knowledge is inferrable from the surrounding circumstances.

First, the General Counsel would invoke the small plant doctrine, which is founded upon the notion that management will learn quickly of union activity where waged openly within a small complement of employees. *Weise Plow Welding Co.*, 123 NLRB 616 (1959). Here, however, Spalding concedes that he was “advised” not to discuss the union

with supervisors, and there is no evidence that he or Caldwell did so, or that either engaged in any union activity under conditions in which they exposed themselves to the risk of observation by management. Cf. *L.A. Baker Electric*, 265 NLRB 1579 fn. 3 (1983). The Board has declined to infer knowledge solely on the basis of the size of the unit in such circumstances. *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991). Other factors enhancing the probability that the employer would have learned of such involvement are absent. Here, the unit consisted of more than 50 employees, in a work force exceeding 100, and there is no credible proof that, as of May 9, the Respondent was aware generally that union organization was under way. Cf. *Dentech Corp.*, 294 NLRB 924, 955–956 (1989); *Kunja Knitting Mills U.S.A.*, 302 NLRB 545 (1990). Nor did the Employer engage in interrogation, surveillance, or otherwise ply a “grapevine” for information on union adherents. Cf. *Active Transportation*, 296 NLRB 431, 432 (1989). Absent such factors, particularly in a unit of this size, the foundation does not exist for a rational inference in this regard. See *Pizza Crust Co.*, 286 NLRB 490, 495 (1987).

Knowledge might also be inferred where the cause assigned for discipline was so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. See, e.g., *Whitesville Mill Service Co.*, 307 NLRB 937 (1992); *DeJana Industries*, 305 NLRB 845 (1991); *Shattuck Denn Mining Corp v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The issue appears relevant in the case of Spalding. At the hearing, the General Counsel attempted to adduce evidence suggesting that the Respondent acted without justification in instructing Spalding to get a haircut and in suspending him for failing to comply. This possibility is revitalized in the Charging Party’s posthearing brief. However, the record fails to cast doubt upon Ballard’s intervention.

The Respondent’s employee handbook, in material part, states:

All employees are expected to be clean, neat, and well groomed at all times. [R. Exh. 1(a).]

Under a formal employee dress and personal appearance policy, dated February 20, 1987, it is stated:

Hair of moderate length will be acceptable but must not prevent the uniform cap from being worn in an acceptable manner. [R. Exh. 1(c).]

Effective July 1, 1988, a personal appearance change was promulgated, in material part stating as follows:

Hair styles of any contemporary style are acceptable, but shall not prevent the uniform cap from being worn in an acceptable manner. Personnel may wear neatly trimmed beards, mustaches and side burns. [G.C. Exh. 13.]

Pursuant to prodding by counsel for the General Counsel, Spalding was a willing declarant of his compliance with that policy:

Q. Was there any rule, at all, governing appearance vis-a-vis, hair?

A. Your hair had to be worn where you could wear your uniform cap.

²¹ Spalding’s sworn, prehearing affidavit states that to his knowledge no supervisor saw him get cards signed.

²² The only other evidence offered by Spalding on the issue of knowledge pertained to his having solicited an authorization card from the brother of a sergeant, testimony which seeks to build inference upon inference in establishing the possibility, but not the probability that Spalding’s conduct in this regard reached the ears of management.

²³ Thompson did not aver that Smothers identified any individuals involved. On cross-examination, Thompson states that the participants in the conversation were not within view, but that he recognized Smothers’ voice.

²⁴ The testimony on direct examination that this occurred on May 4 was not established by Thompson independently, but was funnelled to him through a prejudicially leading question. His prehearing affidavit places the incident on May 7.

Q. And did your cap fit on your head?

A. Yes, sir, I wore it every day.

The General Counsel sought to back this testimony with evidence tending to suggest that the neatness policy was disparately applied against Spalding. Thus, on inquiry from the General Counsel, Spalding testified that never before had he been told by any management representative that his hair was too long, and also that there were numerous other guards that had hair at least as long as his. In addition the General Counsel produced ID cards which bore photos revealing that those depicted, including Spalding, had long hair at the time the photos were taken. Spalding claims that he wore his hair the same length as reflected on his "ID" throughout his employment without ever being questioned by management.

The claim that Spalding was innocent of any offense to the neatness policy does not square with his actual conduct. He did not challenge either Ballard's initial directive or the latter's action in suspending him a week later on grounds that his hair was the same length as it always had been, or that others had longer hair. Instead, Spalding admits that when Ballard told him initially of the need to get his hair cut, he simply explained that he had not had time.²⁵ On May 8, when called down by Ballard, he again did not assert that his hair was of acceptable length, but offered that he was too busy with his farm work to visit a local barber shop on Monday.²⁶ He took this precise position in his confrontation with Fuson later that evening. It is not without significance that Ballard, admits that after informed of his discharge he voluntarily, prior to May 11, got his haircut, a fact that makes it fair to assume that he did so out of need.

Moreover, there is evidence that Spalding's grooming had been addressed by management previously. Thus, in his most recent evaluation, in April 1990, the following appears:

Valuable employee, steady and reliable at work. Needs to work on attendance and keeping beard and hair trimmed. An *asset* top M.A.C.²⁷

This inscription seems objective and lacks the character of disingenuous fabrication. I believe it authentic, and reflective of management's awareness that a grooming problem existed well in advance of any union activity.

In this light, I credit Ballard's testimony that at the time, Spalding's hair was so long that it flipped "up and out"

²⁵ The timing of this directive tends to shade against the possibility that Spalding was treated any differently because of union activity. As heretofore found, it was between the first and second shift on May 1, that Ballard instructed Spalding to get a haircut. There was no testimony indicating that Spalding, apart from attending the April 30 meeting, engaged in any overt union activity in the interim. Under no concept on this record is there room for assumption that the Respondent acquired knowledge of union activity, or who was involved in it, as of 4 p.m. on May 1.

²⁶ In his testimony, Spalding also explained that his wife, who usually cuts his hair, was away on a 2-week trip.

²⁷ G.C. Exh. 2(a). In exacting testimony from Spalding that he had not previously been told that his hair was too long, counsel for the General Counsel did not address this exhibit. When confronted with the document on cross-examination, Spalding stated that this entry was made after he acknowledged the document with his signature. Since he signed the document prior to Fuson and Wheatley, he is entitled to benefit of the doubt.

from under his uniform hat of ball-cap design, and, further, that when he initially instructed Spalding to get a haircut, the latter replied that, "he had been expecting that order." I reject any notion that Spalding was sent home on May 8 for reasons other than his failure to comply with the Respondent's neatness policy.²⁸

2. Union animus

While there is no direct evidence that the Respondent was mindful that Spalding and Caldwell were union activists, the General Counsel has adduced additional evidence showing that the Respondent harbored strong resentment toward union supporters.

Indeed, some of this testimony tended strongly to establish that responsible representatives of the Respondent manifested a proclivity toward union-related discrimination. Each of the several incidents depicted would constitute an independent 8(a)(1) violation; yet, not one is mentioned in the complaint.

Norman Brady, the former sergeant, and Larry Thomas, a former corrections officer, testified to an incident, following the discharges of Spalding and Caldwell, in which Mike Montgomery, the Respondent's vice president of operations revealed a proclivity to effect reprisals against union protagonists. The remark occurred immediately after an antiunion meeting, which according to Thomas, was held on May 7, 9, or 10,²⁹ but which, according to Brady, took place in May or June after the discharges of Spalding and Caldwell. As for his conversation with Montgomery, Thomas testified:

[I] had heard, earlier, that anybody who had dealings with the Union, signing cards or anything or starting it, would be fired.

So, after the meeting I asked him if he said that. He said, "No one would be fired." I said, "Well I just wanted to know, did you say that?"

And he said he would personally take great satisfaction in firing anybody who was starting it or handing out on the cards or something like that.

Norman Brady, at least partially corroborated Thomas. He claims to have overheard the latter's conversation with Montgomery, and that as he remembered, Montgomery stated that "he would take personal satisfaction in firing anybody that had anything to do with the union or was involved with the Union." While I have reservations concerning the credibility of Brady³⁰ and Thomas, who did not impress me as having

²⁸ The General Counsel's own evidence confirms that on May 8, Ballard's sending Spalding home until he got a haircut was not out of the ordinary. Thus, Norman Brady, a former sergeant testified that he made a similar recommendation in connection with another guard that he felt needed a haircut, a recommendation that was short circuited when the officer complied.

²⁹ Later Thomas conceded that it was possible that Spalding and Caldwell might have been discharged before the meeting.

³⁰ Brady, who resigned from the Respondent's employ in August 1990 because passed over for promotion, was too willing to embrace questions propounded by the General Counsel with ill-thought out, unbelievable responses. This is exemplified by his testimony that he would not initiate discipline against a corrections officer who responded to his corrective efforts by addressing a profanity towards him, and by his testimony that he noticed the length of Spalding's

the capacity to grasp events, retain them in memory, and then to relate them as they occurred. Nevertheless, Montgomery was not called, and while not free from doubt, to the extent mutually corroborative, I accept, reluctantly, the testimony of Thomas and Brady.³¹

However, I reach a different result with respect to a statement that Thomas imputes to Fuson. Thomas claims that, he was off work the next several days after the Montgomery antiunion meeting, and he claims that he did not learn of the discharges until his return to work. He avers that, on the day of his return, Fuson called him to his office, and engaged him in the following conversation:

[H]e said that Mr. Montgomery thought I was upset when I left that day, after the meeting. He wanted to assure me, that my job was safe, that I . . . wasn't going to be fired or nothing.

[Mr.] Fuson told me . . . We got rid of the three trouble makers." And he went on and . . . tried to reassure me, that my job was safe . . .

Fuson concedes that he met with Thomas, but insists that it was on request of the latter, who simply informed that he intended to resign and wished to leave on good terms, and that if his new line of work did not pan out, he hoped to return. According to Fuson, the Union was not mentioned, but Thomas did indicate that he did not wish to be associated with what had recently transpired in the facility. Thomas, being regarded by Fuson as a good employee, was assured that there would be no problem. He denied telling Thomas that "We got rid of the three trouble makers," but admits to using words to the effect that "There has been some trouble lately and that the problems are behind us."

Thomas' account seemed incoherent. It is unlikely that Fuson would have called him in to offer assurance caused by Montgomery's professed intention to eliminate union adherents, by reopening the wound through implication that three employees had already been discharged for union activity. Not only did Fuson's account appear more logical, but I was not impressed with Thomas' capacity to comprehend and assimilate information accurately. I consider Fuson's recollection of what was said on that occasion to have the greater reliability, and, accordingly, he is credited.

Cliff Wheatley was the only incumbent employee who testified on behalf of the General Counsel. Wheatley testified that at a meeting addressed by Montgomery, which was attended by about 50 employees, the latter said that if the Union came in, the Company would "be gone." Although uncorroborated, doubt in no other respect is cast upon this undenied testimony by an active employee. It is credited.³²

hair and that the "style" did not change throughout the latter's employment.

³¹ The statement clearly violates Sec. 8(a)(1) of the Act. Like several other incidents litigated by the General Counsel, no such allegation was included in the complaint. In light of the Respondent's failure to call Montgomery, there is no basis for concluding that the issue was fully litigated.

³² Once more a clearcut violation of Sec. 8(a)(1) has gone unmentioned in the complaint, and in light of the Respondent's fail-

D. Conclusions

The General Counsel has established that the discharges took place shortly after Spalding and Caldwell became involved in organizational activity. While there is no evidence that the Respondent, at the time, was aware of that fact, credible evidence does establish that a responsible, high ranking official of the Respondent subsequently professed an inclination to terminate those who would engage in union activity. Assuming that the foregoing suffices to establish that union activity was at least "a" motivating factor, the Respondent has amply established that the discharges would have occurred even if the union were not in the picture. See *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Thus, the General Counsel's circumstantial case collapses when considered against the conduct of Spalding and Caldwell that gave rise to their discharges. Spalding parlayed into a suspension his failure, over a 7-day span, to comply with a simple instruction; and then, when given another opportunity, engaged in an abusive confrontation with the highest ranking official at the facility. Caldwell, in the face of a history of discipline, and repeated expressions as to his unhappiness with his job, having previously been counselled, was given a chance to get his act together. Instead of responding, his expressed disdain for his job became contemptuous when he scornfully dropped his equipment on the floor of the security office.³³

A challenge to the lawfulness of a discharge is not to be regarded lightly where timing is coupled with an expressed predilection on the part of management to rid itself of union adherents. Here, however, the alleged discriminatees had gone beyond the edge of tolerable behavior.³⁴ Moreover, the attempt to trivialize their misconduct on the basis of alleged disparate treatment,³⁵ bypass of the progressive system of

ure to produce countervailing proof, it is concluded that the issue was not fully litigated.

³³ Although the Respondent failed to produce an eyewitness as to what transpired in the security office, the accuracy of facts codified in Wheatley's disciplinary report is substantiated by probability and Caldwell's admissions against interest, including his description of his state of mind at the time.

³⁴ I have no reason to question Fuson's testimony that self-control is a critical qualification for performing the duties of a correction officer.

³⁵ Counsel for the Charging Party introduced a series of documents from the personnel file of James Gray, a trainee, all of which reflect discipline meted out during the term of Gray's employment. C.P. Exh. 1(a)-(f). They reflect a series of suspensions and reprimands between 1986 and 1989, based on misconduct on five occasions. In my opinion, this miscellany of offenses, even if considered collectively, is not so clearly equatable to the conduct of either Spalding or Caldwell to support a reasonably founded conclusion that the latter should have been treated with lenience, or to cast doubt upon the proof that the discharges would have been effected even in the absence of union activity.

discipline,³⁶ and shifting reasons for the terminations,³⁷ did not—even coupled with the uncontradicted evidence of animus—refute the pervasive and entirely credible proof that Spalding and Caldwell would have been terminated even in

³⁶ The Respondent's policy in this area is not so ironclad to reflect that it was offended by these discharges. For obvious reasons, it is inconceivable that an employer, pursuant to such an arrangement, would relinquish authority to discharge in the case of serious offenses. The following sector of the Respondent's policy indicates that sufficient flexibility has been retained to deal with such situations:

Supervisors are encouraged to recommend penalties in a progressive manner beginning with a counseling letter. However, the seriousness of the offense may dictate a higher level of penalty. [R. Exh 1(a), p. 6.]

³⁷ Fuson's alleged lack of precision in describing the basis for the discharges or when they occurred was more in the nature of semantics and perception, which in light of what transpired was not sufficiently inconsistent to be anything more than technical aberrations. Against the record as a whole, any difficulties held by Fuson in recanting his precise mental processes some 2 years earlier did not alter the seriousness of the misconduct, or warrant a conclusion that the Respondent acted on any other grounds. This is particularly so, in light of findings heretofore made that, in the case of both alleged discriminatees, the cause defined in written reports leading to the terminations is substantiated by what actually took place.

the absence of union activity. Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that either was discharged for reasons proscribed by Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging Gabriel Spalding and Charles Caldwell.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁸

ORDER

It is ordered that the complaint herein be dismissed.

³⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.